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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-776

S. H. DU PUY AND LIBERTY MUTUAL INSURANCE COMPANY, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKMEN'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11a-20a) is reported at 519 F. 2d 536.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1975. A timely petition for rehearing was denied on September 3, 1975 (Pet. App. 21a). The petition for a writ of certiorari was filed on November 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether death benefit claims under the Longshoremen's and Harbor Workers' Compensation Act may be compromised by settlement.

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STATUTES INVOLVED

Section 8 of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1264, 33 U.S.C. (Supp. IV) 908, provides in pertinent part:

> Compensation for disability shall be paid to the employee as follows:
>
> * * * * *
>
> (i)(A) Whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of section 15(b) and section 16 of this act: *Provided,* That if the employee should die from causes other than the injury after the deputy commissioner has approved an agreed settlement as provided for herein, the sum so approved shall be payable, in the manner prescribed in this subsection to and for the benefit of the persons enumerated in subsection (d) of this section[1].

Section 9 of the Act, as amended, 33 U.S.C. (Supp. IV) 909, provides in pertinent part:

> If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury,

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[1]Prior to the 1972 Amendments (86 Stat. 1251), subdivision (i) provided in pertinent part (see 52 Stat. 1166):

> (i) In cases under subdivision (c)(21) and subdivision (e) of this section, whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may, with the approval of the [Secretary], approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of section 15(b) and section 16 of this Act * * *.

the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $1,000.

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage * * *.

Section 15(b) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1434, 33 U.S.C. 915(b), provides:

> No agreement by an employee to waive his right to compensation under this Act shall be valid.

Section 16 of the Act, 33 U.S.C. 916, provides:

> No assignment, release, or commutation of compensation or benefits due or payable under this Act, except as provided by this Act, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

STATEMENT

The claimant-widow in this case, Dorothy Allen, filed a claim for death benefits under Section 9 of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 33 U.S.C. (Supp. IV) 909, on account of the November 11, 1972, death of her husband following a shipboard accident. The employer and its insurance carrier, petitioners herein, controverted the claim on the ground that the decedent's death was due to his refusal to accept a blood transfusion following the accident. The claim was referred to an administrative law judge for a formal hear-

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ing, pursuant to Section 19(d) of the Act, as amended, 33 U.S.C. (Supp. IV) 919(d). Before the hearing, however, the claimant and the employer submitted a proposed settlement to the administrative law judge, who approved the settlement and entered a compensation order embodying its terms (Pet. App. 1a-5a).

The Director, Office of Workmen's Compensation Programs, Department of Labor, respondent herein,[2] filed an appeal with the Benefits Review Board, pursuant to Section 21(b) of the Act, as amended, 33 U.S.C. (Supp. IV) 921(b), and 20 C.F.R. Part 801. The Benefits Review Board determined that authority to approve a proposed settlement was vested only in deputy commissioners,[3] under Section 8(i) of the Act, as amended, 33 U.S.C. (Supp. IV) 908(i). The Board therefore vacated the order of the administrative law judge and remanded the case to the deputy commissioner for consideration of the appropriateness of the proposed settlement (Pet. App. 6a-9a).[4]

Thereafter the employer and insurance carrier filed a petition for review in the United States Court of Appeals for the Seventh Circuit, under Section 21(c) of the Act, as amended, 33 U.S.C. (Supp. IV) 921(c). The court of appeals affirmed the Benefits Review Board's action in vacating the order of the administrative law judge but did so on a different ground. The court held that death benefit claims are not subject to settlement under the Harbor Workers' Act. The court reasoned (Pet. App. 18a):

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[2]The Director has been delegated responsibility by the Secretary of Labor to administer the Longshoremen's and Harbor Workers' Compensation Act. 20 C.F.R. 701.201, 701.202, 701.203.

[3]Deputy commissioners are officials appointed by the Director, pursuant to Sections 39(b) and 40 of the Act, 33 U.S.C. 939(b) and 940, to administer the Act in the various compensation districts established thereunder. 20 C.F.R. 701.301(a)(7), 702.101.

[4]The Director did not urge, and the Board did not hold, that the Act precluded settlements of death benefit cases.

> While the ALJ may well have the power to approve a settlement agreement in the case of an injured employee [under 33 U.S.C. (Supp. IV) 908(i)], we do not have such a case here. We are dealing with a claimant who became such by virtue of the death of an employee. Her case is not lodged under section 908 [compensation for disability] but under section 909 [compensation for death]. That section is silent on the matter of settlement.

ARGUMENT

1. Petitioners assert that prior to the decision of the court of appeals in this case, the Department of Labor (or its deputy commissioners) approved a "significant number" of compromise settlements involving death benefit claims under the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, but that since that decision the department has ordered no further compromise agreements of death benefit claims (Pet. 5). Petitioners contend on this basis that, unless the petition for a writ of certiorari is granted in this case, the question whether there is authority under the Act to settle death benefits claims will never again be reviewable in the courts (Pet. 5-8). Neither the premise nor the conclusion is correct.

a. The Department of Labor advises us that, with the exception of a small number of settlements mistakenly approved by deputy commissioners since 1972 (see note 8, *infra*), no death benefit settlements have been approved from the inception of the Act in 1927 to the present day. From 1927 to 1938 the Harbor Workers' Act permitted no settlements of any kind. There was nothing in the Act providing for settlement, thus, settlements were prohibited by Section 16 of the Act, which provides that "[n]o * * * release * * * of compensation or benefits due or payable under the Act, except as provided by the Act, shall be

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valid." In 1938 Congress authorized approval of settlement recommendations in appropriate cases involving two limited classes of disability claims—claims involving non-scheduled permanent partial disabilities and claims for temporary partial disabilities. See 33 U.S.C. (1940 ed.) 908(c)(21), 908(e), 908(i).[5] But no settlements were authorized for any other disability claims. See 33 U.S.C. (1940 ed.) 908(a), (b), (c), and (f). Nor was there any authority to settle death benefits claims under Section 9 of the Act. The regulations of the Department of Labor (which assumed administration of the Harbor Workers' Act in 1950)[6] confirmed the limited statutory authority for settlements under the Act. See 20 C.F.R. 31.26 (1961).

In 1972 Congress expanded the authority of the deputy commissioners to approve settlements, in appropriate cases, of *any* disability claim of an injured employee under Section 8 of the Act. (At the same time Congress removed the necessity for the deputy commissioner to obtain approval of such settlements by the Secretary.) See Section 20(a) of the 1972 Amendments, 86 Stat. 1264. However, Congress made no additions or amendments to Section 9 of the Act that would allow settlements of death benefit claims, although other modifications to Section 9 were made.[7] With respect to death benefit

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[5]The rationale for allowing settlements of these cases, involving compensation subject to readjustment over a long period of time, was to remove future uncertainty in cases where symptoms were subjective and where future rehabilitation could be affected by a later claim by the employer to reduce benefits. S. Rep. No. 1988, 75th Cong., 3d Sess. 6 (1938).

[6]Reorganization Plan No. 19 of 1950, 15 Fed. Reg. 3178, 64 Stat. 1271.

[7]Sections 5(d), 10 and 20(c)(2) of the 1972 Amendments, 86 Stat. 1253, 1257, 1265.

claims, the prohibition of Section 16 of the Act remained in effect.[8]

b. Nor is this case the only one that could present this Court with the opportunity to decide the question whether death benefit cases can be settled under the Act. If the parties in a future controverted death benefit case should be disposed to settle, any rejection of the settlement, for lack of statutory authority, would be a "final order" reviewable under 33 U.S.C. (Supp. IV) 921(c). Since the instant case is the first to consider the scope of Section 8(i) as amended in 1972, there is no need for the Court to review the issues at this time.

2. As is indicated above, the death benefit provision of Section 9 of the Act contains no authority to approve settlements, and Section 16 expressly prohibits settlement except as otherwise provided in the Act. That the authority to approve settlements appears only in the provision relating to disability benefit claims (Section 8), and not in the provision involving death benefit claims (Section 9), is evidence that Congress intended to distinguish between the two types of claims. Nothing in the language or

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[8]Because the 1972 Amendments authorized deputy commissioners to approve settlements of disability claims without further approval of the Secretary, the Secretary has lacked centralized control over settlements since 1972. But the Secretary has brought the court's decision in this case, the first case dealing with the scope of Section 8(i) since the 1972 Amendments, to the attention of the Department's regional offices to confirm (not to change) the Department's pre-existing position against approval of death benefit settlements. Inasmuch as there has been no past authority or practice in the Department to approve settlement of death benefit cases, petitioners err in claiming that the Department has merely acquiesced in the decision of the court of appeals.

legislative history of Section 8(i) indicates or suggests that the settlement authority it confers was also intended to apply to claims for death benefits under Section 9.

a. Petitioners contend (Pet. 11) that the "injured employee," in whose best interest a settlement may be approved under Section 8(i), should be deemed to include the statutory survivors of a deceased employee. But this contention ignores the fact that Section 8, by its express terms, relates only to "[c]ompensation for *disability*" (emphasis added). Thus whatever meaning the term "injured employee" may properly be given in other provisions of the Act,[9] Congress must be presumed to have used it in its literal sense in Section 8(i), as referring to the disabled claimant. Indeed, this reading is confirmed by the proviso of Section 8(i), which provides that if the "employee" dies *after* settlement has been approved, from causes *other than the injury*, the agreed sum is to be paid to his statutory survivors; this clearly manifests a congressional intent to make posthumous settlement unavailable where death results from the injury.

b. Petitioners also contend (Pet. 8-9) that a construction that would exclude settlements in death benefit cases should be avoided because it is contrary to a general policy in favor of settlements. But while settlement agreements are encouraged in most areas of the law, that is not the case with regard to workmen's compensation. Many States have statutes comparable to Sections 15(b) and 16 of the Harbor Workers' Act, prohibiting settlement of workmen's compensation benefits. See 3 Larson, *Workmen's Compensation Law* §§82.31, 82.32 (1973). At least one reason for these provisions is explained as follows:

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[9] *E.g.*, Sections 4 and 10(a)-(e), 33 U.S.C. 904 and 910(a)-(e).

> The public has ultimately borne the cost of compensation protection in the price of the product, and it has done so for the specific purpose of avoiding having the disabled victims of industry thrown on private charity or public relief. To this end, the public has enacted into law a scale of benefits that will forestall such destitution. It follows, then, that the employer and employee have no private right to thwart this objective by agreeing between them on a disposition of the claim that may, by giving the workman less than this amount, make him a potential public burden.
>
> * * * * *
>
> [T]he objective of the legislation * * * is to insure that those with truly compensable claims get full compensation. If there is doubt about the compensability of the claim, the solution is not to send the claimant away half-compensated, but to let the compensation board decide the issue. That is the board's job.

3 Larson, *supra*, at §§82.41, 82.42, citing *Nagy* v. *Ford Motor Co.*, 6 N.J. 341, 78 A. 2d 709, *Laukaitis* v. *Sisters of Charity*, 135 Mont. 469, 342 P. 2d 752, and *Southern* v. *Department of Labor & Industries*, 39 Wash. 2d 475, 236 P. 2d 548.

The same policy is reflected in Section 16 of the Act, invalidating any settlement agreements "except as provided in this Act." It is also reflected in the legislative development of the Act. No authority to approve settlements was granted under the original Act, as enacted in 1927; thereafter only limited settlement authority was permitted. In extending the settlement authority to all disability claims in 1972, Congress gave "careful consideration" to the recommendations made by the National Commission on State Workmen's Compensation Laws in its report issued on July 21, 1972. S. Rep. No. 92-1125, 92d Cong.

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2d Sess. 2 (1972).[10] One of the Commission's recommendations was that compromise and release agreements be permitted "only rarely," to guard against deprivation of rights to benefits,[11] and to prevent the undermining of "an active workmen's compensation agency."[12]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1976.

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[10]The Commission was established under Section 27 of the Occupational Safety and Health Act of 1970, 84 Stat. 1616, 29 U.S.C. 676, to study state workmen's compensation laws to determine whether they provide an adequate, prompt, and equitable system of compensation.

[11]Report of the National Commission on State Workmen's Compensation Laws, p. 110 (1972).

[12]*Id.* at 109.